



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC PETITION NO. 619 OF 2017

(Formerly NAIROBI PETITION 488 OF 2015)

IN THE MATTER OF: ARTICLE 19, 22, 23, 40, 47,

50, & 64 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: REGISTERED LAND ACT (REPEALED)

IN THE MATTER OF: CONTRAVENTION OF RIGHT TO PROPERTY

IN THE MATTER OF: PURPORTED REVOCATION OF

TITLE NUMBER NGONG/ NGONG/ BLOCK 2/ 644

BETWEEN

GEORGE KIMANI KANGETHE.....PETITIONER

VERSUS

LAND REGISTRAR KAJIADO.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

JUDGMENT

By a Petition dated the 30th October, 2015, the Petitioner is seeking for the following orders and declaration that:

- (a)** A declaration that the Certificate of Lease issued to the Petitioner is respect to the suit property NGONG TOWNSHIP BLOCK 2/644 is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property.
- (b)** An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed, the 1st Respondents gazette notice number 15584 dated 26th November, 2010 purporting to revoke the Petitioner's title to all that parcel of land comprised in title no. NGONG TOWNSHIP BLOCK 2/644 or in any manner interfering with the Petitioner's possession of the said premises.
- (c)** An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from alienating the Petitioner's parcel of land comprised in title no. NGONG TOWNSHIP BLOCK 2/644 or in any manner interfering with the Petitioner's possession of the said premises.
- (d)** An order of prohibition do issue to prohibit the Respondents by themselves, servants, agents or whomsoever from in any manner issuing any title and/or license in respect to the Petitioner's land comprised in title no. NGONG TOWNSHIP BLOCK 2/644 or in any manner registering any encumbrance thereon.
- (e)** An Order of mandamus do issue to compel the Respondents by themselves, servants, agents to delete any entry on the Petitioner's certificate of title made as a consequence to or in furtherance of all that parcel of land comprised in title number NGONG TOWNSHIP BLOCK 2/644.

(f) A declaration that the respondents purported revocation of the Petitioner's title to all that parcel of land comprised in title number NGONG TOWNSHIP BLOCK 2/644.

(g) Damages.

(h) Costs of an incidental to this suit.

The Petition is supported by the affidavit of GEORGE KANGETHE the Petitioner herein where he avers that he is the registered owner of NGONG TOWNSHIP BLOCK 2/644 which he purchased from one Joyce Naseriae in the year 2007. He claims to have carried out an official search, prior to purchasing the said plot which revealed that the said NGONG TOWNSHIP BLOCK 2/644 was the registered in the vendor's name and the certificate of official search issued did not reveal any restrictions/encumbrances on the plot. He confirms that he executed a transfer and the ownership was effectively transferred to him after payment of the requisite stamp duty, after which he was issued with a certificate of lease on 13th November 2007, by the land registrar of Lands Kajiado. He contends that he has been paying rates to the County Council of Olkejuado for the term he has been in possession of the premises. He states that on 5th of September, 2015, he met with one Empantus Kimotho Kimani who owns a plot adjacent to his NGONG TOWNSHIP/BLOCK 2/244. Further, that in the course of their discussion he informed him of the revocation of their titles vide a special Gazette Notice No. 15581 in the year 2010, which indicated that the Government through the Registrar of Lands Kajiado had revoked his title but he never knew of the sad revocation. He reiterates that he carried out an official search on the 29th September, 2015 following the advertisement and the search revealed that a restriction had been placed against his title and the restriction is attributed to the above mentioned gazette notice. He insists he stands to suffer massive losses due to the revocation and subsequent restriction as the current market value of the suit land stands as Kshs. 4,000,000/=. He strongly believe that the purported revocation is a travesty of justice because he obtained the parcel of land after sanctions/ approvals by the very same officers who have purportedly revoked his title. He denies being notified of the respondent's intention to revoke his title nor was he given an opportunity to be heard before the decision to revoke it was arrived at.

The 1st Respondent opposed the Petition and filed grounds of opposition dated the 3rd November, 2017 where he stated as follows:

1. That the Petitioner ought to have filed a civil suit in which the court would have hand opportunity to hear witnesses and examine documents in support of the ownership of the suit property.
2. That the Petitioner has not demonstrated how the articles of the Constitution relied on in the Petition have been infringed.
3. That the orders sought by the Petitioner affects parties who are not enjoined in this suit.
4. That the Petition in itself will not resolve the question of ownership.

The 2nd Respondent did not file any response to the Petition despite being duly served.

Both the Petitioner and the 1st Respondent filed their respective written submissions to canvass the Petition.

Petitioner's Submissions

The Petitioner submitted that he is a purchaser for value without notice and that prior to the purchase he conducted due diligence which revealed there was no encumbrance registered over the suit land. He submits that he paid all the stamp duty, after which the property was transferred to him and he was issued with a certificate of lease on 13th November, 2007 by the land registrar of Kajiado District. Further, that he has been paying rates and rents to the County Council of Ol-kejuado for the term he has been in possession of the premises. On 27th September, 2015 he carried out a search which revealed that a restriction has been placed against his title and he stands to suffer massive losses. He submits that the vide the Gazette Notice No. 15581 contained in the Kenya Gazette Special Issue dated 26th November 2010, the Registrar of Lands caused to be published a "Notification of Revocation of Land Title" with a list of parcels of land including the suit land. The said Gazette Notice by the 1st Respondent revoking the Petitioner's title to the suit land states that the allocation and issuance of such land to private developers was illegal and unconstitutional as the government had noticed that such parcels of land were reserved for public purposes. The notice further states that the land was reserved for a community center. The Petitioner denies being contacted, consulted, warned or in any other way informed of the impending revocation, prior to the purported revocation. He contends that the reason in the gazette notice is shallow as well as sketchy since the said Notice does not specifically state the purported public purposes or the precise sections of the law under which their properties were deemed to be public land. Further, that the Constitution and the Registered Lands Act (now repealed) under which the suit property was registered discloses no provision granting powers to the 1st respondent to revoke titles to land. He submits that the respondents in purporting to revoke his title acted without any legal authority as it was done without forewarning him or requiring him to explain his title individually. Further, that the decision was arrived at without any regard to the adverse ramifications it would have on his proprietary interest in the suit property. The revocation is tantamount to state compulsory acquisition with compensation. He submits that as a result of the revocation of his title, his rights to acquire and own property in Kenya Under Article 40 (1) of the Constitution are being violated. Further, that his right to be protected from deprivation of property by the state unjustly and without compensation under article 40 (3) is being infringed. He relied on various judicial authorities including: **Samuel Murimi Karanja & 2 Others –vs- Republic, HCC Criminal Application No. 412 of 2003 ; Ocean View Plaza Ltd –vs- A.G. (2002) 2 KLR,; Kuria Greens Limited –vs- Registrar of Title & Anor (2011) eKLR; petition Number 22 of 2011 EPHANTUS KIMOTHO KIMANI & 6 OTHERS –VS- ATTORNEY GENERAL & ANO (2013) eKLR; Attorney General's Reference No. 2 of 2001 (2003) UKHL; Republic –vs- Kisumu District Land Officer & ano (2010) eKLR; Kenya Breweries Ltd –vs- Municipal Council of Mombasa Misc. Appl. No. 244 of 2001 (2009) eKLR ; Simon Brown in R-V-Devon County Council Ex P Baker (1995) 1 All E.R; Council of Civil Service –vs- Minister for Civil Service (1984) 3 ALL ER 935; Barclays Bank of Kenya –vs- City Council of Nairobi Misc. Application No. 1261 of 2005 (Unreported); Republic –vs- District Health Officer, Kisii & ano. Ex Parte Mageto & 11 others (2005) 1KLR (E&L) and Regina –vs- The University Dental Surgery (1993) 1 EWHC) to support his arguments.**

He submitted that the repealed Land Acquisition Act which was in force at the time of the purported revocation, contained instructive provisions whenever the government bought to compulsorily acquire private property. Further that the Commissioner under Section 6 (2) is required to

“cause a notice that government intends to acquire the land to be published in the Gazette Notice on every person who appears to him to be interested in the land”

He emphasized that the Land Act, provides a more elaborate procedure of compulsory land acquisition by the Government, be it the central or County Government. For instance the Act requires the Cabinet Secretary or the County Executive Committee Member to submit a request to the National Land Commission to acquire land on its behalf. The said commission would be required to establish guidelines to be adhered to for the compulsory acquisition and may accept or reject the request if it does not meet the requirements under Article 40 (2) of the Constitution. It's upon the approval that the commission proceeds to publish in the Gazette Notice and County Gazette and deliver a copy of the Notice to the interested parties. Section 10 of the Act provides that for such an acquisition the Commission has to certify in writing that the land is required for public purposes or in public.

He insists the act of revoking his title on the account of purported “public interest” violates the Acts aforesaid and is not founded on any legislative enactment. He reiterated that the attempt to deregister his land so as to vest the land in the government is equal to an acquisition of land by government from an individual albeit without following the law. The government was and still is under a duty to strictly apply the Constitution and the prevailing statute on land acquisition. There was neither certification by the Minister nor Issuance of notice by the 2nd Respondent to the Petitioner as stipulated by Act. The Constitution also stands to be breached unless the Petitioner is justly and promptly compensated.

He contended that the impugned Gazette Notice states “in view of the Public need and interest, the Government revokes the said title. The Notice is signed by the 1st Respondent. It is instructive that the notice does not indicate the provisions of the law invoked by the 1st Respondent in revoking his title. This was not an omission, there simply is no legislative or Constitutional mandate bestowed on the 1st Respondent or the Government for that matter to revoke a registered title. Further, that Non-consideration of the implications of the purported revocation of his proprietary interest is another aspect that rendered the decision unreasonable. It was within the knowledge of the respondents that he has been in possession of the suit property since 1993 and has invested as well as continues to invest in its development. He further submitted that as per the Constitution he is entitled to being given a written reason for administrative action that adversely affects its Constitutional rights before a decision is undertaken. Failure to give reasons for the purported revocation, the Respondents in this case invite the inevitable conclusion that their decision was arbitrary and arrived at without proportionate inquiry. The decision is not only bad administratively; but it is also unconstitutional.

He referred to the Constitution at Article 50(1) as read together with Article 47 (1) that entitle every person to a fair hearing. Such fair hearing is necessary as an ingredient of fair administrative action and in circumstances, where as in the present case there is evidently dispute over the ownership of land. Administratively, he ought to have been called upon to explain for the acquisition of his property since the Respondent's records clearly indicate that he was the registered proprietor.

1ST RESPONDENT'S WRITTEN SUBMISSIONS

The 1st Respondent submitted that the Petition is premised on a Gazette Notice No. 15584 contained in the gazette notice issued by the Land Registrar on 26th November, 2010, in which he caused to be published a notification of revocation of titles with a list of parcels of land including the Petitioner's parcel of land NGONG TOWNSHIP/BLOCK 2/644 which is the suit land herein. He relied on the grounds of opposition dated 7th November, 2017 and submissions hereto. He submitted that the action of the Land Registrar to revoke title to the suit property was justified. The government as a custodian of public land under the doctrine of public trust in the Constitution was justified to intervene by revoking the Petitioner's title to the suit property. He contended that there are several exceptions permissible in law to procedural fairness such as in the case where fairness in form of disclosure would be prejudicial to public interest, or where prompt action is needed and, or it is impractical to comply with the fairness requirement. He further submitted that from the Gazette Notice NO. 15584, there is an indicator that the suit property was public land that was **reserved for public utility**. He relied on the following cases: **Cortec Mining Kenya Limited –vs- Cabinet Secretary Ministry of Mining & 9 Others (2015) eKLR; Petition no. 23 of 2011 Electrical Options Limited –vs- The Attorney General and Commissioner of Lands (2012) eKLR**; to support his arguments opposing the Petition. He further submitted that though the Petitioner seeks constitutional protection under article 47 (1) and (2), he cannot do so under the umbrella of a tainted title. It is trite that he who seeks equity must first come with clean hands. Further, that the only way to ascertain whether or not the Petitioner acquired this title legally is for the Court to properly examine evidence presented before it and witnesses through a proper forum of filing a civil suit. He contends that since they are not able to cross examine, and by relying on affidavit evidence in such a case, it would cause prejudice to either of the parties and amount to denial of fair hearing as enshrined in special cases that do not need calling of a witness. He reiterates that for the Petitioner to claim breach, the court must first make a determination of ownership of the suit property before determining the issue raised in the Petition. He insists that in such a case, calling the witnesses and examining them will enable the court to clearly ascertain the true owner of the land. He further submits that the court cannot find that the actions of the land Registrar to revoke the Petitioner's title, were in violation of Article 47 of the constitution when the same title was acquired unlawfully. He submitted that Equity cannot aid an illegality. He referred to **Article 40 (3)** of the Constitution 2010 that protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in public interest and is carried out in accordance with the Constitution or an Act of Parliament and prompt payment in full is made for just compensation. Further, that this is achieved through the procedure set out in the **Land Acquisition Act**. However, under **Article 40 (6)** of the constitution, provides an exception to this right where the land was acquired illegally. He insists that the Petitioner must have acquired the land unlawfully because it was already marked as a public land. The 1st Respondent emphasized that the Petitioner cannot enjoy constitutional protection as under Article 40 (6) since the suit property was fraudulently and illegally acquired and the same was never available for allocation in the first place as it was public utility. He states that the suit property reserved for a specific purpose & developed with public funds hence could not be available for allocation, hence the Petitioner cannot benefit from protection of the constitution in such a case of blatant fraudulent and illegally acquisition. He further relied on the case of **Miscellaneous application NO. 504 of 2003 Republic –vs- The Permanent Secretary Ministry of Public Works & Housing (2014) eKLR**. The 1st Respondent submitted that the Court must weigh the broader public interest against Petitioner's private interest. The Petitioner's

interest must yield to the broader public interest. The 1st Respondent submitted that the orders sought in this Petition, ought not to be granted by this Honorable Court and that the Court should allow parties to file pleadings and viva voce evidence at another forum, preferably the Civil Courts, in order to determine the issue of ownership of the suit property which is still in dispute. The 1st Respondent further submitted that the Petitioner has quantified the current market value of the suit property as Kenya Shillings four million (Ksh. 4,000,000/=), which he alleges to be the total amount of monetary loss that he will incur due to the revocation and restriction of the suit property but has not produced evidence to that effect, hence the prayer for special damages must fail. He relied on the cases of **Civil case No. 1058 of 2006 Delta Haulage Services Limited –vs- Complast Industries Limited the Court; Civil Appeal No. 445 of 2003 Zacharia Waweru Thumbi –vs- Samuel Njoroge Thuku (2006) ; Miscellaneous Application No. 504 of 2003 Republic –vs- The Permanent Secretary Ministry of Public Works & Housing (20-14) eklr** to support this argument. The 1st Respondent argued that the orders sought in this Petition are discretionary and not guaranteed and that the Court should weigh whether remedy is most efficacious in the circumstances.

Analysis and Determination

Upon perusal of materials presented in respect of the Petition herein including the supporting, supplementary and replying affidavits as well as the submissions herein, the following are the issues for determination:

- a. Whether 1st Respondent's act of cancelling Petitioner's title contravened Article 40 and 47 of the constitution?
- b. Whether the Petitioners' Constitutional Rights to own property has been violated.
- c. Whether the Petitioner is entitled to the reliefs sought in the Petition.

I note there was a gazette notice in November 2010 revoking the Petitioner's Certificate of Lease. The Petitioner contends that the gazette notice revoking his title was issued without prior consultation with him. The issue of the said gazette notice has not been controverted by the Respondents. The Petitioner avers that as a result of the said gazette notice, his Constitutional rights were violated as he was condemned unheard. The Respondents did not submit any evidence to prove they had notified the Petitioner on the revocation of his title prior to the gazette notice.

Article 47(1) provides –

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

In the current scenario I note that the District Land Registrar, Kajiado undertook an administrative action against the Petition and gazetted his Certificate of Title for revocation without adhering to section Article 47 of the Constitution where he was required to notify the Petitioner and grant him an opportunity of being heard first, before the said gazette notice process.

In the case of COMMUNICATIONS COMMISSION OF KENYA & OTHERS VS. ROYAL MEDIA SERVICES & OTHERS the court held as follows:

“Article 47 in the circumstances is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful, reasonable and procedurally fair public policies. A breach of Article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party's legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at unprocedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.”

Further in the **Case of David Oloo Onyango Vs AG Civil Appeal No. 152 of 1986**, the Court of Appeal held that it is a violation of the rules of natural justice if a party is condemned unheard.

In another case of **Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR** the Judge held that: **‘The concept of lawfulness in administrative context is derived from the greater concept of the rule of law under the Constitution. I have discussed at length (at paragraphs 120 – 147) both the constitutional principle and the rule of law. Put in brief, where a power or discretion is conferred upon a person or body under the Constitution, that power or discretion must be exercised in accordance with or subject to the Constitution. Likewise, if the power is conferred by or under a law, it must be exercised in accordance with that law. Administrators even when exercising their power of discretion must do so within the confines of the law. ‘**

In so far as the actions complained of occurred in 2010 before the enactment of the Fair Administrative Act. I wish to refer to the provisions of the Fair Administrative Act at Section 4(3) that stipulates as follows:

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and make representation in that regard;

c. notice of a right to review or internal appeal against an administrative decision, where applicable;

d. a statement of reasons;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

It is against the foregoing that I find that indeed the Respondents' acts constitutes a violation and contravention of the Constitution as they failed to exercise their discretion in accordance with the power conferred upon them within the Constitution to give the Petitioner an audience before revoking the Certificate of Lease. I will proceed to quash the gazette notice Vol. CX II – No 124 dated 26th November, 2010 – No. 15581, cancelling the Petitioner's Certificate of title as it violated his Constitutional rights under Article 40 and 47 of the Constitution and was tainted with procedural impropriety since the Petitioner was not accorded a hearing before the same was published.

However on the issue of the other prayers sought by the Petitioner on the validity of the Petitioner's title as well as damages, I do concur with the 1st Respondent, that this will require viva voce evidence before the Court can make a proper determination which I am not able to do at this juncture. I direct the Petitioner to institute a civil case where he can present all the evidence to enable the Court assess and determine whether his title is valid or not; and the damages he has suffered as a result of the gazette notice.

It is against the foregoing that I find the Petition dated 30th October, 2015 merited and allow it in accordance with the terms I have stated above.

Dated signed and delivered in open court at Kajiado this 19th day of July, 2018

CHRISTINE OCHIENG

JUDGE